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 1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF HAWAII
 3
 4 RELIANCE INSURANCE COMPANY, ETC.,) CIVIL NO. 02-00159HG
 5 PLAINTIFF,)
 6 VS.)
 7 THE DOCTORS COMPANY, ETC.,)
 8 DEFENDANT.)
 9

10 TRANSCRIPT OF PROCEEDINGS
 11 THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING ON
 12 FRIDAY, AUGUST 9, 2002, AT 9:50 A.M., AT HONOLULU, HAWAII,
 13 BEFORE: THE HONORABLE HELEN GILLMOR
 UNITED STATES DISTRICT JUDGE
 14 DISTRICT OF HAWAII
 15 REPORTED BY: STEPHEN B. PLATT, RMR, CRR
 OFFICIAL U. S. DISTRICT COURT REPORTER
 16 DISTRICT OF HAWAII
 17 APPEARANCES: PAUL F. DONSBACH, ESQ.
 620 NEWPORT CTR. DRIVE, SUITE 450
 18 NEWPORT BEACH, CALIFORNIA 92660
 19 ATTORNEY FOR THE PLAINTIFF
 20 DAROLYN H. LENDIO, ESQ.
 PHILIP W. MIYOSHI, ESQ.
 21 500 ALA MOANA BLVD., FL 4
 HONOLULU, HAWAII 96813
 22 ATTORNEYS FOR THE DEFENDANT
 23
 24
 25

0002
 1 FRIDAY, AUGUST 9, 2002 9:50 A.M.
 2 -00000-
 3 THE CLERK: CIVIL NUMBER 02-159, RELIANCE INSURANCE
 4 COMPANY VERSUS THE DOCTORS' COMPANY.
 5 THIS CASE IS CALLED FOR HEARING ON DEFENDANT THE
 6 DOCTORS' COMPANY'S MOTION TO DISMISS COMPLAINT.
 7 MR. DONSBACH: GOOD MORNING, YOUR HONOR.
 8 PAUL DONSBACH APPEARING ON BEHALF OF RELIANCE
 9 INSURANCE COMPANY.
 10 THE COURT: GOOD MORNING.
 11 MR. MIYOSHI: GOOD MORNING, YOUR HONOR.
 12 PHILIP MIYOSHI AND DAROLYN LENDIO ON BEHALF OF THE
 13 DOCTORS COMPANY.
 14 THE COURT: GOOD MORNING.
 15 IT IS THE DOCTORS' COMPANY'S MOTION, SO IF YOU WANT
 16 TO SPEAK FIRST AT THE LECTERN, PLEASE.
 17 MR. MIYOSHI: THANK YOU, YOUR HONOR.
 18 YOUR HONOR, THE DOCTORS' COMPANY IS MOVING TO
 19 DISMISS THE CLAIMS FOR EQUITABLE CONTRIBUTION AND INDEMNITY ON
 20 THE BASIS THAT THE COMPLAINT, ON THE FACE OF IT, FAILS TO
 21 STATE A CLAIM.
 22 SPECIFICALLY WITH RESPECT TO THE EQUITABLE
 23 CONTRIBUTION CLAIM, THE PLAINTIFFS FAILED TO ALLEGE THAT
 24 THERE'S A COMMON BURDEN OBLIGATION --
 25 THE COURT: OKAY, NOW, BEFORE YOU GET STARTED, IT

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1 SEEMS TO ME, BEFORE I CAN DECIDE WHETHER OR NOT THERE IS A
 2 CLAIM STATED, I HAVE TO KNOW WHAT LAW I AM APPLYING, AND I AM
 3 A LITTLE CONFUSED AS TO BOTH SIDES' BELIEF AS TO WHAT LAW I
 4 SHOULD BE APPLYING. I DON'T SEE HOW I CAN POSSIBLY MAKE A
 5 DECISION ABOUT WHETHER OR NOT A CLAIM HAS BEEN STATED UNLESS I
 6 KNOW WHAT LAW I AM APPLYING. IT'S NOT AN ABSTRACT THING THAT
 7 I CAN DO WITHOUT MAKING A FINDING UNDER A PARTICULAR
 8 JURISDICTION.

9 SO WHAT'S THE LAW I AM APPLYING IN ORDER TO DECIDE
 10 YOUR MOTION.

11 MR. MIYOSHI: YOUR HONOR, WE WOULD SAY THAT THE LAW
 12 OF HAWAII APPLIES. WE HAVEN'T SET THAT FORTH IN OUR BRIEFING;
 13 I DO UNDERSTAND THAT, BUT, EVEN BEYOND THAT, I THINK THAT THE
 14 LAW IS SO WELL ESTABLISHED WITH RESPECT TO CONTRIBUTION --

15 THE COURT: BUT IT STILL HAS TO BE A PARTICULAR
 16 JURISDICTION'S LAW. I JUST CAN'T DO IT IN THE ABSTRACT. I'M
 17 NOT A LAW PROFESSOR; I AM SUPPOSED TO BE APPLYING LAW OF A
 18 PARTICULAR JURISDICTION.

19 MR. MIYOSHI: AND, AS I STATED PREVIOUSLY,
 20 YOUR HONOR, I BELIEVE THAT THE LAW OF HAWAII WOULD APPLY IN
 21 THIS CIRCUMSTANCE.

22 THE COURT: OKAY.

23 MR. MIYOSHI: AND, GIVEN THAT, I THINK HAWAII IS NO
 24 DIFFERENT FROM ANY OF THE OTHER JURISDICTIONS THAT WE HAVE
 25 CITED TO, WHICH ESSENTIALLY PROVIDE THAT WHEN A CLAIM FOR

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1 CONTRIBUTION IS MADE, THE INITIAL -- OR THRESHOLD INQUIRY HAS
 2 TO BE WHETHER OR NOT A COMMON OBLIGATION, BURDEN OR LIABILITY
 3 EXISTS. AND, AS ALLEGED IN PLAINTIFF'S COMPLAINT, I DON'T
 4 BELIEVE THEY WILL CONTEST, AND, IN FACT, THEY PROBABLY WOULD
 5 AGREE THAT BY DEFINITION, PRIMARY AND EXCESS INSURANCE
 6 POLICIES DO NOT IMPLICATE A COMMON BURDEN OBLIGATION. THEY
 7 ARE INDEPENDENT, UNIQUE AND SEPARATE COVERAGES; WHERE ONE
 8 COVERAGE LEAVES OFF, THE OTHER TAKES ON.

9 AND I THINK THAT THIS IS PRETTY MUCH
 10 WELL-ESTABLISHED IN ALL OF THE CASE LAW THAT WE CITED,
 11 PARTICULARLY IN THE CASES THAT WE CITED IN OUR REPLY MEMO THAT
 12 HAVE SPECIFICALLY LOOKED AT THE ISSUES OF EXCESS AND PRIMARY
 13 INSURER ISSUES AND HAVE STATED THAT THE GENERAL RULE IN THOSE
 14 CASES IS THAT THERE IS NO CONTRIBUTION BECAUSE OF THE SEPARATE
 15 AND UNIQUE NATURE OF THE DIFFERENT COVERAGES. AND, ON THAT
 16 BASIS ALONE, THE MOTION TO DISMISS WITH RESPECT TO THE
 17 EQUITABLE CONTRIBUTION SHOULD BE GRANTED.

18 I'M NOT REALLY CLEAR ON WHAT THE PLAINTIFF'S
 19 POSITION IS ON THAT, BECAUSE THERE REALLY WAS NO RESPONSE AS
 20 TO THAT PART OF OUR ARGUMENT.

21 IN ADDITION, THE SECOND PART, WHICH WAS ADDRESSED
 22 PRIMARILY BY THE PLAINTIFFS, IS WHETHER OR NOT THE PAYMENT, OR
 23 THE ALLEGED -- THE PURPORTED OVERPAYMENT WAS DONE NOT
 24 VOLUNTARILY BUT UNDER THREAT OF LEGAL COMPELSION -- OR, BY
 25 LEGAL COMPELSION.

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1 PLAINTIFF PRIMARILY RELIES ON CERTAIN CASES FROM
 2 OTHER JURISDICTIONS FOR THE PROPOSITION THAT THE VOLUNTEER
 3 DOCTRINE WITH RESPECT TO AN INSURER -- WHERE AN INSURER PAYS
 4 MORE THAN HIS FAIR SHARE, THAT THOSE JURISDICTIONS STAND FOR
 5 THE PROPOSITION THAT -- THAT'S KIND OF AN OLD AND ARCHAIC
 6 DOCTRINE, BUT MOST OF THE CASES THAT HE CITES TO ARE DEALING
 7 WITH CIRCUMSTANCES WHERE THERE WERE CO-INSURERS, AND WHERE
 8 THEY WERE OBLIGATED COMMONLY IN THE FIRST INSTANCE. SO, IN
 9 THE FIRST CIRCUMSTANCE, THE DOCTORS' COMPANY DOES NOT DISPUTE
 10 THAT CONTRIBUTION IS PROPER; BUT, WHEREAS HERE, WHEN THEY ARE

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11 SEPARATE, AND UNIQUE AND INDEPENDENT COVERAGES, THAT
 12 CONTRIBUTION CERTAINLY ISN'T WARRANTED.

13 THE HAWAII CASES THAT PLAINTIFF RELIES ON, THE FIRST
 14 ONE IS ALAMEDA, THE ALAMEDA CASE, AND, IN THAT CASE, THAT CASE
 15 IS DISTINGUISHABLE. AND, IN FACT, I BELIEVE THAT CASE
 16 SUPPORTS OUR INITIAL PROPOSITION THAT YOU NEED TO ESTABLISH A
 17 COMMON BURDEN OR OBLIGATION OF LIABILITY. IN THERE, THERE WAS
 18 AN ACCIDENT THAT OCCURRED, AND THE PLAINTIFF SUED A DEFENDANT
 19 WHO ULTIMATELY FILED A THIRD-PARTY ACTION AGAINST MULTIPLE
 20 OTHER THIRD-PARTY DEFENDANTS. AND WHAT HAPPENED WAS, SEVERAL
 21 OF THE DEFENDANTS GOT TOGETHER, INCLUDING THIRD-PARTY
 22 DEFENDANTS, AND SETTLED THAT CLAIM. THERE WAS ONE NONSETTLING
 23 DEFENDANT; I BELIEVE THAT WAS THE CITY -- OR THE COUNTY OF
 24 HAWAII. THE REMAINING -- THE SETTLING DEFENDANTS THEN SUED
 25 THE NONSETTLING DEFENDANT FOR, I BELIEVE IT WAS, CONTRIBUTION.
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1 THE COURT THERE SAID, LISTEN, YOU REALLY DON'T HAVE A CLAIM
 2 FOR CONTRIBUTION AGAINST THESE GUYS. AND, ADMITTEDLY, THAT
 3 WAS UNDER THE STATUTORY PROVISION, BUT I THINK THEIR ANALYSIS
 4 IS INSTRUCTIVE, NEVERTHELESS, BECAUSE THERE THEY SAID, LISTEN,
 5 THERE WAS NO JOINT OBLIGATION OR LIABILITY; THUS, YOUR CLAIM
 6 IS REALLY A SUBROGATION CLAIM.

7 SO, IN THAT CONTEXT, ALAMEDA ACTUALLY SUPPORTS OUR
 8 POSITION THAT THAT CONTRIBUTION IS NOT WARRANTED HERE. BUT
 9 WHAT PLAINTIFF PRINCIPALLY RELIES ON, ON ALAMEDA, FOR IS THE
 10 DOCTRINE THAT A PERSON UNDER THREAT OF CIVIL SUIT ISN'T A
 11 VOLUNTEER. SO, IF YOU MADE A PAYMENT WHEN THERE IS SOME
 12 THREAT OF LEGAL ACTION, THEN THEY ARE NOT A VOLUNTEER, AND
 13 THEY ARE ENTITLED TO CONTRIBUTION.

14 ASSUMING, IN THE FIRST INSTANCE, THAT THERE IS A
 15 COMMON OBLIGATION OR BURDEN AMONGST THE PARTIES, WHICH WE
 16 ASSERT THERE IS NOT; BUT, ASSUMING SO, EVEN UNDER ALAMEDA, IN
 17 THE VOLUNTEER -- IN THEIR VOLUNTEER DOCTRINE, THAT DOESN'T
 18 SUPPORT THE CLAIMS THAT THEY HAVE ALLEGED IN THEIR COMPLAINT,
 19 BECAUSE NOWHERE IN THE COMPLAINT HAVE THEY ALLEGED THAT THEY
 20 WERE UNDER A LEGAL THREAT TO MAKE THIS PURPORTED OVERPAYMENT.
 21 ESSENTIALLY, IF YOU LOOK AT THE COMPLAINT --

22 THE COURT: WELL, BUT WASN'T THERE A LAWSUIT
 23 ALREADY?

24 MR. MIYOSHI: THERE WAS A LAWSUIT, AND IT WAS
 25 BEING -- THE DEFENSE WAS BEING HANDLED BY THE DOCTORS'
 0007

1 COMPANY, AND NO RESERVATION OF RIGHTS LETTERS WERE SENT. SO
 2 THERE WAS FULL INDEMNIFICATION. THE PLAINTIFFS IN THE
 3 UNDERLYING TORT ACTION WERE GOING TO BE INDEMNIFIED
 4 REGARDLESS, BECAUSE THERE WAS PRIMARY COVERAGE BEING PROVIDED
 5 BY THE DOCTORS'S COMPANY, AND THEN RELIANCE HAD A \$25
 6 MILLION EXCESS POLICY. SO, REGARDLESS, THERE WAS GOING TO BE
 7 SOME PAYOUT.

8 THERE MAY HAVE BEEN A DISPUTE AS TO WHO ACTUALLY
 9 OWED WHAT --

10 THE COURT: BUT I AM A LITTLE CONFUSED THAT YOU ARE
 11 TALKING ABOUT THERE WAS NO THREAT OF CIVIL SUIT WHEN YOU WERE
 12 IN THE MIDDLE OF A LAWSUIT.

13 MR. MIYOSHI: WE WERE IN --

14 THE COURT: AND WAS RELIANCE IN THAT LAWSUIT?

15 MR. MIYOSHI: WELL, HERE, IN THIS INSTANCE, WE WERE
 16 NOT PARTIES TO THIS LAWSUIT; WE WERE INSURING THE INSURED WHO
 17 ARE PART OF THE LAWSUIT. SO I THINK --

18 THE COURT: WHO WAS PROVIDING THE DEFENSE?

19 MR. MIYOSHI: THE DOCTORS' COMPANY.

20 THE COURT: OKAY.

21 MR. MIYOSHI: WE WERE PROVIDING THE --

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22 THE COURT: OKAY. SO YOU WERE IN THAT LAWSUIT --
 23 MR. MIYOSHI: YES.
 24 THE COURT: -- AS PROVIDING THE DEFENSE. AND WAS
 25 RELIANCE IN THE LAWSUIT?

0008 1 MR. MIYOSHI: RELIANCE WAS PARTICIPATING IN, I
 2 BELIEVE, WHAT EVENTUALLY ENDED UP BEING THE SETTLEMENT OF THE
 3 CASE; BUT, IN TERMS OF --
 4 THE COURT: OKAY, WHAT I AM HAVING DIFFICULTY WITH,
 5 MR. MIYOSHI, IS HOW WE GOT HERE. YOU'VE GOT THE PLAINTIFF IN
 6 THE UNDERLYING ACTION; YOU'VE GOT THE DEFENDANTS IN THE
 7 UNDERLYING ACTION -- STRAUB, THE TWO DOCTORS -- YOU'VE GOT
 8 BOTH INSURANCE COMPANIES INVOLVED.

9 MR. MIYOSHI: UH-HUH.
 10 THE COURT: YOU HAVE A SETTLEMENT.
 11 MR. MIYOSHI: UH-HUH.

12 THE COURT: AND HERE WE ARE... HOW DID THIS HAPPEN?
 13 AND YOU'RE TALKING ABOUT THERE BEING NO THREAT OF CIVIL SUIT.
 14 THERE WAS A CIVIL SUIT. EVERYBODY WAS INVOLVED. SO HOW CAN
 15 WE TALK ABOUT THERE BEING NO THREAT OF CIVIL SUIT?

16 MR. MIYOSHI: WELL, THERE WAS NO THREAT OF CIVIL
 17 SUIT IN THE SENSE THAT THEY ARE TALKING ABOUT IT, BECAUSE THEY
 18 SAID THAT THEY WERE COMPELLED TO PAY, SOMEHOW, AN AMOUNT OF
 19 MONEY THAT THEY WEREN'T OBLIGATED TO PAY. NOW, IF THEY
 20 WEREN'T OBLIGATED TO PAY THAT IN THE FIRST INSTANCE -- OR
 21 THAT'S THEIR ARGUMENT --

22 THE COURT: YOU KNOW, IF WE GO AROUND AND AROUND
 23 LIKE THIS, THIS JUST TELLS ME I NEED TO DISMISS THIS SUIT AND
 24 SEND IT BACK TO STATE COURT WHERE THIS HAPPENED, BECAUSE, IF
 25 WE CAN'T GET TO THE BOTTOM OF THIS, THEN IT REALLY DOESN'T

0009 1 BELONG IN FEDERAL COURT; IT NEEDS TO GO BACK TO STATE COURT,
 2 WHERE THIS THING HAPPENED. I MEAN, THIS REALLY -- I DON'T
 3 THINK YOU ANSWERED MY QUESTION.

4 MR. MIYOSHI: YOUR HONOR, YOU MAY VERY WELL BE --
 5 THAT MAY VERY WELL HAVE TO BE THE CASE IN THIS ACTION, BECAUSE
 6 ALL OF -- IN FACT, IF WE GO FORWARD, THIS IS PROBABLY GOING TO
 7 BE A MATTER WHERE WE ARE GOING TO HAVE TO ESSENTIALLY LITIGATE
 8 THE UNDERLYING ACTION AGAIN, AS WELL. BUT IT'S BEEN SETTLED
 9 ALREADY, SO, I MEAN --

10 THE COURT: AND EVERYBODY WAS THERE, AND EVERYBODY
 11 WAS PARTICIPATING.

12 MR. MIYOSHI: EXACTLY. AND I THINK THAT'S PART OF
 13 THE DOCTORS' COMPANY'S POSITION. AND MAYBE FRUSTRATION WITH
 14 THIS WHOLE PROCESS IS THAT, YOU KNOW, EVERYBODY
 15 PARTICIPATED -- THIS IS ESSENTIALLY -- THE SETTLEMENT HAPPENED
 16 AND OCCURRED OVER TWO YEARS AGO, AND ONLY NOW THERE HAS BEEN A
 17 LAWSUIT FILED TRYING TO ESSENTIALLY GET BACK MONEY THAT THEY
 18 PURPORTEDLY OVERPAID IN THE SETTLEMENT. AND, IN THAT SENSE,
 19 WE, I GUESS ALTERNATIVELY, WOULD FEEL THAT THIS CASE COULD BE
 20 DISMISSED ON THOSE GROUNDS, AS WELL.

21 THANK YOU, YOUR HONOR.
 22 THE COURT: THANK YOU.

23 MR. DONSBACH: GOOD MORNING, YOUR HONOR.
 24 THE COURT: GOOD MORNING.
 25 MR. DONSBACH: PAUL DONSBACH.

0010 1 YOUR HONOR, INITIALLY, I SHOULD ADDRESS THE ISSUE OF
 2 HOW WE GOT HERE, AND --
 3 THE COURT: WELL, INITIALLY, LET'S ADDRESS WHAT LAW
 4 I AM APPLYING.
 5 MR. DONSBACH: VERY GOOD.
 6 AS WE INDICATED IN OUR POSITION, WE THINK IT'S EARLY

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7 IN THE LITIGATION --

8 THE COURT: IT'S NOT EARLY IN THE LITIGATION IF I'M
 9 DECIDING A LEGAL ISSUE. A LEGAL ISSUE HAS BEEN RAISED AS TO
 10 WHETHER OR NOT THERE IS LIABILITY UNDER WHAT'S BEEN ALLEGED IN
 11 THE COMPLAINT, AND IT IS -- IT'S BEFORE ME. I CAN'T DECIDE A
 12 LEGAL ISSUE WITHOUT KNOWING WHAT LAW I APPLY. IT CAN'T BE
 13 EARLY IN THE CASE. YOU FOLKS HAVE TO ADDRESS THAT. IT'S JUST
 14 NOT POSSIBLE FOR ME TO OPERATE IN A VACUUM. HOW CAN I DO
 15 THAT?

16 MR. DONSBACH: I AGREE. AND WE ARE AT A LITTLE BIT
 17 OF A DISADVANTAGE BECAUSE IT WASN'T RAISED IN THE MOTION;
 18 HOWEVER, FOR PURPOSES SIMPLY OF THIS MOTION, RELIANCE WOULDN'T
 19 OBJECT TO THE APPLICATION OF HAWAII LAW; HOWEVER, IT WOULD
 20 RESERVE ITS RIGHTS WITH RESPECT TO THE REMAINDER OF THE
 21 LITIGATION AFTER IT DOES --

22 THE COURT: I DON'T THINK YOU CAN DO THAT. I MEAN,
 23 I DON'T SEE HOW I CAN START OUT APPLYING ONE LAW TO THE ACTUAL
 24 UNDERLYING THEORIES AND CHANGE MY MIND LATER. HOW CAN I DO
 25 THAT? BASICALLY, A MOTION TO DISMISS IS, HAS THERE BEEN
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1 SUFFICIENT ALLEGATIONS UNDER THE LAW THAT'S APPLICABLE OF A
 2 CLAIM? THAT'S JUST, IN A VERY STREAMLINED FASHION, THE ISSUE
 3 BEFORE ME. SO I CAN'T PROVISIONALLY DECIDE THAT THERE'S BEEN
 4 A CLAIM UNDER ONE LAW, AND THEN -- UNLESS THERE'S A VERY GOOD
 5 REASON WHY THERE'S BEEN SOME MISTAKE THAT I'VE MADE. I MEAN,
 6 IT IS POSSIBLE THAT THAT COULD HAPPEN.

7 I'M NOT SAYING -- BUT, ONCE WE RECOGNIZE THAT WE
 8 HAVE THIS AS AN ISSUE, I REALLY CAN'T AGREE WITH THE IDEA THAT
 9 YOU'RE GOING TO DO IT PROVISIONALLY AND THEN LATER ON TRY TO
 10 TALK ME OUT OF IT IF YOU CHOOSE TO. IT SEEMS TO ME IT HAS TO
 11 BE RESOLVED TO THE BEST OF OUR ABILITY, AND THEN IF SOMETHING
 12 CAME UP IN A TRIAL, SOMETHING DEVELOPED, IT WOULD BE
 13 APPROPRIATE FOR ME TO CHANGE WHAT LAW. BUT THAT WOULD BE AN
 14 EXTREMELY RARE SITUATION. BUT I THINK IT'S A PRIMARY
 15 QUESTION.

16 I MEAN, IF YOU WANT TO TAKE THAT POSITION, THAT'S
 17 FINE, BUT I AM JUST SAYING THAT I REALLY HAVE PROBLEMS WITH
 18 THE IDEA THAT YOU ARE RESERVING THE RIGHT TO CHANGE YOUR MIND.
 19 MR. DONSBACH: I CERTAINLY UNDERSTAND YOUR HONOR'S
 20 VIEWS ON THAT, AND I GUESS, FOR THESE PURPOSES, IT'S VERY
 21 LIKELY THAT --

22 THE COURT: YOU CAN TAKE THAT POSITION; I AM JUST
 23 TELLING YOU THAT I HAVE A PROBLEM WITH IT.
 24 MR. DONSBACH: I CERTAINLY UNDERSTAND THAT,
 25 YOUR HONOR. I GUESS MY RELUCTANCE TO COMMIT ONE WAY OR
 0012

1 ANOTHER DERIVES FROM THE FACT THAT OUR OFFICE HASN'T DONE THE
 2 CHOICE OF LAW ANALYSIS AT THIS POINT. AGAIN, IT IS EARLY IN
 3 THE LITIGATION, AND I -- THAT RELATES TO -- YOU KNOW, ONE OF
 4 THE ISSUES HERE IS, IN ALL OF THE CASES CITED BY THE DOCTORS'
 5 COMPANY, AND IN OUR OPPPOSITION, THE ISSUE OF WHERE THEIR
 6 CONTRIBUTION WOULD LIE WAS AN ISSUE THAT WAS DECIDED ON THE
 7 MERITS. AND IN ALL OF THESE CASES, THE COURTS LOOKED AT WHAT
 8 WAS EQUITABLE. AND IN DOING SO, IN LOOKING AT ALL OF THE
 9 MERITS, AT THAT POINT IT WOULDN'T BE A DIFFICULT ISSUE TO
 10 DETERMINE WHAT STATE'S LAW WOULD APPLY. HERE I THINK IT IS A
 11 BIT OF A DISADVANTAGE FOR US, FACED WITH A MOTION THAT RELIES
 12 ON THE LAW OF VARIOUS STATES WITHOUT EVER SPECIFYING WHAT LAW
 13 WAS PURPORTED --

14 THE COURT: BUT, YOU SEE, YOU BROUGHT THE LAWSUIT.
 15 MR. DONSBACH: THAT'S CORRECT, YOUR HONOR.

16 THE COURT: SO --

17 MR. DONSBACH: SO, WITHOUT BELABORING THE ISSUE, I

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18 THINK THE COURT --

19 THE COURT: WE SHOULD PROBABLY MOVE ON, BUT YOU ARE
20 THE PLAINTIFF.21 MR. DONSBACH: CORRECT. AND THE COURT, I THINK,
22 COULD CERTAINLY APPLY THE LAW OF HAWAII IN THIS LITIGATION. I
23 WOULD LIKE -- TO THE EXTENT I CAN -- TO RESERVE THE RIGHT TO
24 ADDRESS THAT ISSUE FURTHER AFTER WE HAVE LOOKED MORE
25 SPECIFICALLY AT THE CHOICE OF LAW ISSUES.
00131 THE OTHER TWO OBVIOUS ALTERNATIVES WOULD BE THE LAW
2 OF CALIFORNIA, WHERE THE DOCTORS' COMPANY IS INCORPORATED, OR,
3 PENNSYLVANIA, WHERE RELIANCE IS INCORPORATED. AND, AT SOME
4 POINT, I WOULD LIKE THE OPPORTUNITY TO LOOK AT THAT FURTHER
5 AND SEE WHETHER EITHER OF THOSE STATES MIGHT APPLY, AT LEAST
6 IN PART, ON SOME ISSUES IN THE LITIGATION. BUT, AT THIS
7 POINT, I THINK, PROBABLY, THE MOTION COULD BE DECIDED UNDER
8 HAWAII LAW.

9 THE COURT: GO AHEAD.

10 MR. DONSBACH: WHAT I THINK THE DOCTORS' COMPANY HAS
11 DONE, WITH RESPECT TO THEIR MOTION, IS, THEY HAVE TAKEN SOME
12 LANGUAGE OUT OF A VARIETY OF CASES, AND WITHOUT LOOKING AT
13 REALLY WHAT WAS GOING ON IN EACH OF THOSE CASES, AS TO WHAT
14 WAS EQUITABLE, HAVE TRIED TO CONSTRUCT THIS RULE THAT WHERE
15 YOU HAVE AN EXCESS INSURER THAT PAYS A SETTLEMENT IN ORDER TO
16 SETTLE THE CASE, THAT IT'S FOR SOME REASON NOT ENTITLED TO GO
17 BACK AND GET THAT AMOUNT IN CONTRIBUTION.18 THERE IS NO CASE THAT HAS EVER HELD THAT, TO MY
19 KNOWLEDGE, AND THERE'S CERTAINLY NONE CITED IN ANY OF THE
20 BRIEFS. INSTEAD, WHAT WE SEE ARE A COLLECTION OF CASES ON
21 CONTRIBUTION THAT ARE WHOLLY INAPPLICABLE AND NOWHERE HOLD
22 THAT AN EXCESS INSURER IS NOT ENTITLED TO CONTRIBUTION.23 IN ALL THESE CASES, THE COURTS -- BECAUSE THESE WERE
24 CONTRIBUTION CLAIMS -- WERE REALLY LOOKING AT WHAT WAS
25 EQUITABLE. AND, IN EACH OF THESE CASES, THEY WERE FACED WITH
00141 A CASE THAT HAD BEEN LITIGATED ON THE MERITS, AND ALL OF THE
2 VARIOUS CIRCUMSTANCES COULD BE LOOKED AT IN DETERMINING WHAT
3 WAS EQUITABLE.4 WHAT THE DOCTORS' COMPANY HAS PRESENTED ARE CASES
5 THAT FALL INTO A VARIETY OF CATEGORIES, AND ONE OF THEM IS,
6 THEY HAVE CITED SOME CASES WHERE A PRIMARY INSURER SOUGHT
7 CONTRIBUTIONS FROM AN EXCESS INSURER, WHERE -- AND THE
8 DECISION THAT THE APPELLATE COURT MADE IN EACH OF THOSE CASES
9 WAS THAT THE PRIMARY POLICY LIMITS HAD NOT BEEN EXHAUSTED.
10 THEREFORE, OBVIOUSLY, IF THE PRIMARY INSURER HAS PAID A CLAIM
11 WITHIN ITS POLICY LIMITS, IT'S NOT, OBVIOUSLY, GOING TO BE
12 ENTITLED TO CONTRIBUTION AS AGAINST AN EXCESS INSURER. AND
13 THAT IS THE RELIANCE CASE FROM CALIFORNIA, AS WELL AS THE
14 USF&G CASE FROM OKLAHOMA, IN THE TENTH CIRCUIT -- I BELIEVE
15 BOTH FROM LAST YEAR.16 IN ALL OF THOSE CASES, WHAT WAS INVOLVED WAS A
17 PRIMARY GOING AGAINST AN EXCESS FOR CONTRIBUTION. IN THOSE
18 CASES, AND IN SOME OF THE CASES THAT WE DISCUSSED IN OUR
19 BRIEF, THE COURTS, IN ADDITION TO LOOKING AT WHETHER THE
20 PRIMARY POLICY HAD, IN FACT, BEEN EXHAUSTED, ALSO LOOKED AT,
21 REALLY, WHAT WAS THE RELATIONSHIP BETWEEN THE PRIMARY AND THE
22 EXCESS INSURER. AND, IN SOME OF THESE CASES WHICH WERE CITED
23 IN OUR OPPOSITION, THE COURTS HAD POINTED OUT THAT AN EXCESS
24 INSURER, WHEN IT'S FACED WITH A CONTRIBUTION CLAIM FROM A
25 PRIMARY INSURER, REALLY IS IN A DIFFERENT EQUITABLE SITUATION
00151 THAN THE PRIMARY INSURER, BECAUSE IT, IN CALCULATING ITS
2 PREMIUMS, NEVER ANTICIPATED THAT IT COULD BE LIABLE FOR THE



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3 ENTIRE JUDGMENT. UNDER AN EXCESS POLICY, THE DUTY TO
 4 INDEMNIFY ONLY ARISES WHEN THE UNDERLYING PRIMARY HAS BEEN
 5 EXHAUSTED.

6 SO, WHEN A PRIMARY ASSERTS A CONTRIBUTION CLAIM
 7 AGAINST AN EXCESS INSURER, IN A NUMBER OF CASES THE COURTS
 8 HAVE SAID, YOU CAN'T DO THAT BECAUSE THE EQUITIES ARE NOT THE
 9 SAME. THE EXCESS INSURER HAS NOT OBLIGATED ITSELF TO THE SAME
 10 OBLIGATIONS THAT THE PRIMARY HAS, UNDER ITS POLICY.

11 WE DID CITE, IN OUR OPPOSITION, CASES FROM AT LEAST
 12 THREE JURISDICTIONS SPECIFICALLY HOLDING THAT WHERE AN EXCESS
 13 INSURER COMES IN, PAYS A SETTLEMENT, AND SEEKS A PORTION OF
 14 WHAT IT PAID AS AGAINST THE PRIMARY BECAUSE OF THE EXISTENCE
 15 OF THE COVERAGE DISPUTE, THAT CONTRIBUTION WILL LIE. THE
 16 EXCESS INSURER IS ENTITLED TO CONTRIBUTION. THE THREE
 17 JURISDICTIONS, I BELIEVE, WERE COLORADO, ARKANSAS AND IOWA.

18 IN ITS REPLY, THE DOCTORS' COMPANY, IN EFFECT,
 19 PROVED THE POINT THAT WE WERE MAKING WITH RESPECT TO THE
 20 SIGNIFICANCE OF THOSE CASES AS PRECEDENT. AND --

21 THE COURT: DO YOU THINK THAT ISSUE HAS BEEN DECIDED
 22 IN HAWAII?

23 MR. DONSBACH: IT HAS IN THE ALAMEDA CASE BEFORE THE
 24 HAWAII SUPREME COURT, AND ALSO THE NINTH CIRCUIT CASE, THE
 25 FIRST INSURANCE CASE, WHICH WAS APPLYING HAWAII LAW.
 0016

1 WHAT THEY LOOKED AT IN THAT CASE WAS THE EQUITIES
 2 INVOLVED IN A CONTRIBUTION CLAIM BETWEEN INSURERS. AND THE
 3 ISSUE WAS -- OR AT LEAST THE ARGUMENT BY ONE OF THE INSURERS
 4 WAS THAT THERE WAS -- IN THEIR VIEW, THERE WASN'T A LEGAL
 5 THREAT, OR AN ACTUAL CLAIM PENDING BY THE INSURED AS AGAINST
 6 THE INSURED THAT WAS SEEKING CONTRIBUTION.

7 AND WHAT THE COURT SAID IS THAT, IN THE INTEREST OF
 8 PROTECTING THE INSURED, AS A PUBLIC POLICY MATTER, THAT YOU
 9 WANT TO BE ABLE TO HAVE THE INSURERS, WHERE THERE'S A COVERAGE
 10 DISPUTE, TO GO AHEAD AND SETTLE THE CLAIM, AND THEN BE ABLE
 11 TO -- THROUGH EQUITABLE DOCTRINES -- ALLOCATE THE LOSS
 12 ACCORDING TO COVERAGE. AND THE HAWAII SUPREME COURT
 13 SPECIFICALLY REJECTED THIS NOTION OF THE VOLUNTEER, THAT WHERE
 14 AN INSURER PAYS MORE THAN ITS PRO RATA SHARE, IT'S SOMEHOW
 15 ACTING AS A VOLUNTEER AND IS NOT ENTITLED TO REIMBURSEMENT.
 16

17 SO I THINK THE HAWAII SUPREME COURT HAS COME DOWN
 18 VERY SPECIFICALLY IN FAVOR OF ALLOWING INSURERS TO GO AHEAD
 19 AND SETTLE CASES, AND THEN, IN ACCORDANCE WITH EQUITY, HAVE A
 20 REIMBURSEMENT BETWEEN THE INSURERS.

21 WE DID POINT OUT IN OUR OPPOSITION THAT THE ALAMEDA
 22 CASE ACTUALLY INVOLVES THE JOINT AND SEVERAL LIABILITY, AND
 23 THE STATUTE RELATING TO THAT. AND THE COURT THERE WAS BOUND
 24 BY STATUTORY GUIDELINES, AS OPPOSED TO EQUITABLE ONES, AND DID
 25 RATHER THAN CONTRIBUTION. HOWEVER, THAT REALLY IS DICTUM
 0017

1 BECAUSE THE CASE CAME UP TO THE SUPREME COURT AS A
 2 CONTRIBUTION CASE, A JUDGMENT WAS ENTERED IN FAVOR OF THE
 3 PLAINTIFF IN THAT CASE, AS A CONTRIBUTION JUDGMENT, AND THE
 4 SUPREME COURT AFFIRMED. IF IT HAD REALLY BELIEVED THAT
 5 SUBROGATION HAD TO BE THE REMEDY AND NOT CONTRIBUTION, IT
 6 WOULD HAVE HAD TO HAVE REVERSED AND SENT IT BACK DOWN FOR
 7 A DETERMINATION ON SUBROGATION, WHICH IS A VERY DIFFERENT
 8 DOCTRINE THAN CONTRIBUTION.

9 AS A PUBLIC POLICY MATTER, IT WOULD BE A DRACONIAN
 10 PRECEDENT TO SAY THAT WHERE AN EXCESS INSURER PAYS A CLAIM ON
 11 BEHALF OF THE INSURED AND IS ENTITLED TO CONTRIBUTION AS --
 12 FOR PURPOSES OF THIS MOTION, IT'S UNDISPUTED THAT RELIANCE DID
 13 PAY \$2 MILLION THAT WAS ACTUALLY TDC'S OBLIGATION TO PAY. IT

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14 WOULD BE A DEVASTATING PRECEDENT TO SAY THAT THAT INSURER IS
 15 NOT ENTITLED TO CONTRIBUTION, AND THAT IT SHOULD BE LIMITED TO
 16 THE MUCH MORE RESTRICTIVE DOCTRINE OF SUBROGATION. THAT WOULD
 17 BE A GRAVE DETERRENT TO INSURERS --

18 THE COURT: BUT WOULDN'T I BE DOING THAT, IN TERMS
 19 OF HAWAII LAW, AS A CASE OF FIRST IMPRESSION? AND I WOULD BE
 20 ATTEMPTING TO FIGURE OUT WHAT THE HAWAII SUPREME COURT WOULD
 21 DO WITHOUT THE PRESENCE OF A STATUTE, AND BETWEEN PRIMARY AND
 22 EXCESS CARRIERS. AND ALAMEDA INVOLVES, YOU KNOW, JOINT TORT-
 23 FEASORS; IT'S NOT THE INSURANCE COMPANY. SO, AREN'T YOU
 24 REALLY SAYING THAT THIS IS A CASE OF FIRST IMPRESSION IN TERMS
 25 OF HAWAII LAW?

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1 MR. DONSBACH: IT DEPENDS ON HOW YOU LOOK AT THE
 2 DOCTRINE. THE WAY THE CASES HAVE LOOKED AT THIS, THEY HAVEN'T
 3 SEPARATED OUT THIS VOLUNTEER IDEA FROM THE IDEA OF COMMON
 4 LIABILITY. IN A NUMBER OF THE CASES -- AND WE DISCUSS THIS IN
 5 OUR BRIEF --

6 THE COURT: WELL, WOULDN'T IT BE A FIRST CASE WHERE
 7 THE INSURERS WERE INVOLVED IN THE STATE OF HAWAII, IF I WERE
 8 TO RULE ON THIS?

9 MR. DONSBACH: THE FIRST INSURANCE CASE WAS A NINTH
 10 CIRCUIT CASE APPLYING HAWAII LAW. SO I THINK WE CAN LOOK TO
 11 THAT. BUT, WITH RESPECT TO --

12 THE COURT: WELL, LET'S TALK ABOUT THAT. TELL ME
 13 HOW THAT IS SIMILAR HERE.

14 MR. DONSBACH: THAT WAS A CASE THAT DID INVOLVE
 15 INSURERS -- (PERUSING DOCUMENTS) -- AND THE ARGUMENT WAS
 16 ESSENTIALLY THE SAME ARGUMENT THAT WAS RAISED HERE, THAT THE
 17 ONE INSURER THAT HAD PAID THE CLAIM WAS DOING SO AS A
 18 VOLUNTEER AND WASN'T ACTING --

19 THE COURT: WAS THERE A PRIMARY INSURER AND AN
 20 EXCESS CARRIER INSURED THERE, OR --

21 MR. DONSBACH: NO, IT WAS A CGL INSURER AND A
 22 PROFESSIONAL LIABILITY INSURER.

23 THE COURT: SO THEY DIDN'T HAVE -- IT WASN'T A
 24 PRIMARY AND THE EXCESS?

25 MR. DONSBACH: NO. SO IF YOUR HONOR'S QUESTION IS,
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1 HAVE THE HAWAII STATE COURTS SPECIFICALLY ADDRESSED THE ISSUE
 2 OF CONTRIBUTION BY AN EXCESS INSURER AS AGAINST A PRIMARY
 3 INSURER, I'M NOT AWARE OF ANY AUTHORITY. SO, TO THAT EXTENT,
 4 IT MIGHT BE DEEMED AN ISSUE OF FIRST IMPRESSION. BUT I THINK
 5 BOTH THE FIRST INSURANCE AND THE ALAMEDA CASES PROVIDE VERY
 6 STRONG GUIDANCE --

7 THE COURT: WELL, THEY PROVIDE SOME GUIDANCE, BUT IT
 8 ISN'T -- WE DON'T HAVE A HAWAII CASE ON POINT.

9 MR. DONSBACH: I THINK, TO THAT EXTENT, THAT THAT'S
 10 CORRECT. AND THESE CASES, THOUGH, DO TELL US HOW THE HAWAII
 11 COURTS LOOK AT WHAT THE PUBLIC POLICY ISSUES ARE, IN TERMS OF
 12 SETTLEMENTS WITH RESPECT TO INSUREDS.

13 IN THIS CASE IT'S UNDISPUTED, FOR PURPOSES OF THE
 14 MOTION, THAT THE DOCTORS' COMPANY OWED \$3 MILLION IN INSURANCE
 15 COVERAGE; THAT WAS FOR THE THREE CLAIMS.

16 THE COURT: I DON'T THINK YOU CAN SAY THAT'S
 17 UNDISPUTED. I THINK THAT'S WHY WE'RE HERE.

18 MR. DONSBACH: WELL, FOR PURPOSES OF THE MOTION TO
 19 DISMISS, THE ALLEGATIONS OF THE COMPLAINT ARE ACCEPTED AS
 20 TRUE, AND THAT IS ONE OF THE ALLEGATIONS, IS THAT TDC, THE
 21 DOCTORS' COMPANY, OWED \$3 MILLION IN COVERAGE. AND, AS A
 22 PUBLIC POLICY ISSUE, WHICH IS WHAT THE HAWAII COURT WAS
 23 LOOKING AT IN ALAMEDA, HOW DO YOU WANT TO APPROACH ALLOCATION
 24 AMONG THE INSUREDS? DO YOU WANT TO HAVE AN IMPEDIMENT OR A

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25 DETERRENT TO THE INSUREDS TO SETTLE THOSE CASES BY DISALLOWING
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1 THE DOCTRINE OF CONTRIBUTION IN THAT CIRCUMSTANCE AND LIMITING
2 THEM TO SUBROGATION, OR -- AND THIS IS THE WAY THE HAWAII
3 SUPREME COURT CAME DOWN IN ALAMEDA -- DO YOU WANT TO GO AHEAD
4 AND ENCOURAGE THE INSURERS TO SETTLE THE CASE, PROTECT THE
5 INSURED, TAKE CARE OF THE THIRD-PARTY CLAIMANT? AND, HERE, IT
6 WAS A \$4.3 MILLION SETTLEMENT, WHICH OBVIOUSLY INVOLVED VERY
7 SIGNIFICANT INJURIES AND A COMPELLING NEED FOR COMPENSATION.
8 THAT'S THE WAY THAT THE HAWAII SUPREME COURT HAS COME DOWN.

9 AND, FRANKLY, THE COURTS IN ALL OF THE OTHER JURISDICTIONS, IN
10 MODERN TIMES, HAVE ALSO MADE THAT DETERMINATION, THAT YOU WANT
11 TO ENCOURAGE SETTLEMENTS; YOU DON'T WANT TO DETER AN INSURER
12 FROM PAYING MORE THAN IT THINKS IS OWED UNDER ITS POLICY.

13 I WANTED TO ADDRESS THE ISSUE OF THE LEGAL THREAT,
14 BECAUSE THAT WAS SOMETHING THAT TDC DISCUSSED IN ITS REPLY.
15 AND WHAT I THINK THEIR POSITION IS, ALTHOUGH THEY DON'T SAY
16 THIS, IS THAT, UNLESS THERE IS AN ACTUAL LAWSUIT FILED AGAINST
17 THE INSURER, THEN THEY WOULDN'T CONSIDER THAT A LEGAL THREAT.
18 AND THAT IS EXACTLY CONTRARY TO WHAT ALL OF THE MODERN CASES
19 SAY, IS THAT -- AND, IN FACT, THIS IS ALSO STATED IN HAWAII
20 CASES, ALAMEDA AND FIRST INSURANCE, THAT THERE SIMPLY NEEDS TO
21 BE A THREAT OF LEGAL ACTION, NOT, IN FACT, LEGAL ACTION
22 PENDING AGAINST AN INSURER. IT'S SIMPLY THE THREAT OF THAT
23 ALONE SHOULD BE SUFFICIENT TO TAKE THEM OUT OF THE UMBRELLA OF
24 BEING A VOLUNTEER.

25 AND, OBVIOUSLY, THE POLICY UNDERLYING THAT IS THAT
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1 AN INSURER SHOULDN'T HAVE TO, IN EVERY INSTANCE, BRING A
2 LAWSUIT WHERE THERE'S A COVERAGE DISPUTE IN ORDER TO GET A
3 THIRD-PARTY CLAIM SETTLED. IT'S NOT UNUSUAL TO HAVE COVERAGE
4 DISPUTES BETWEEN INSURERS WHEN YOU HAVE A VERY SIGNIFICANT
5 CLAIM LIKE THIS ONE THAT IMPLICATES MORE THAN ONE POLICY
6 LEVEL. AND, IN THOSE CIRCUMSTANCES, THE COURTS HAVE VERY
7 STRONGLY COME DOWN ON THE SIDE OF ALLOWING THE INSURERS TO
8 SETTLE THE CASE AND LATER WORK OUT BETWEEN THEMSELVES WHAT THE
9 ACTUAL COVERAGE WAS UNDER THE VARIOUS POLICIES.

10 THANK YOU, YOUR HONOR.

11 THE COURT: I HAVE A COUPLE QUESTIONS:

12 I DID ASK YOU TO ADDRESS THE QUESTION OF THE
13 JURISDICTION, AND YOU DID SO. BUT I'M HAVING SOME DIFFICULTY
14 WITH THIS, BECAUSE IT APPEARS THAT IT SHOULD BE HAWAII LAW; IT
15 APPEARS THAT THERE ARE SOME ISSUES OF FIRST IMPRESSION; AND,
16 IT APPEARS THAT, WHATEVER HAPPENED IN THAT CASE OVER IN STATE
17 COURT WAS IMPORTANT TO THE RESOLUTION OF THIS CASE.

18 I HEARD THE DEFENDANT'S CHARACTERIZATION OF WHO WAS
19 THERE AND WHAT WENT ON. WHAT'S YOUR TAKE ON THAT?

20 MR. DONSBACH: THE CASE WAS NOT DETERMINED ON THE
21 MERITS; IT WAS SETTLED. THERE WAS NO DETERMINATION OF
22 LIABILITY THAT WOULD AFFECT HOW COVERAGE WOULD BE APPLIED IN
23 THIS CASE. THAT CASE WAS SETTLED AFTER -- WELL BEFORE THE
24 TRIAL DATE, AND THERE WERE NO DISPOSITIVE MOTIONS EVEN
25 PENDING, AS FAR AS I'M AWARE OF, AND CERTAINLY NONE THAT HAD
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1 BEEN DECIDED --

2 THE COURT: HOW WAS YOUR PLAINTIFF INVOLVED?

3 MR. DONSBACH: WAS NOT A PARTY, NOR WAS THE DOCTORS'
4 COMPANY A PARTY. THE PARTIES WERE THE MAGDA PLAINTIFFS,
5 STRAUB, AND THE TWO -- I BELIEVE IT'S TWO DOCTORS WERE
6 PARTIES.

7 THE COURT: AND YOU WEREN'T INVOLVED IN ANY WAY? I
8 MEAN, DOCTORS SAID THEY PROVIDED THE ATTORNEYS.

9 MR. DONSBACH: THAT'S CORRECT. SINCE THE DOCTORS

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10 HAD THE PRIMARY POLICY, THEY HAD THE DUTY TO DEFEND, AND THEY
 11 WERE PAYING --

12 THE COURT: HOW DID IT END UP THAT YOUR FIRM WROTE A
 13 CHECK?

14 MR. DONSBACH: THE DOCTORS' COMPANY TOOK THE
 15 POSITION THAT THEY CONSIDERED IT ONLY ONE CLAIM. THEY FELT
 16 THAT STRAUB WAS THE ONLY ENTITY THAT WAS IMPLICATED UNDER
 17 THEIR POLICY, EVEN THOUGH THEY AGREED THAT THE OTHER DOCTORS
 18 WERE ADDITIONAL NAMED INSUREDS UNDER THEIR POLICY. THEY JUST
 19 WANTED TO IGNORE THAT.

20 THE COURT: WELL, SOMEBODY CALLED UP ON THE
 21 TELEPHONE AND SAID, WRITE ME A CHECK FOR \$3.3, AND YOU FOLKS
 22 SAID, FINE?

23 MR. DONSBACH: THERE WERE SIGNIFICANT DISCUSSIONS
 24 OVER A PERIOD OF ABOUT SIX MONTHS BETWEEN THE PARTIES, AND
 25 STRAUB WAS VERY UPSET AND FELT THAT THE DOCTORS' COMPANY WAS
 0023

1 HOLDING UP THE SETTLEMENT. RELIANCE, EARLY ON, RECOGNIZED
 2 THAT ITS EXCESS POLICY WAS IMPLICATED, ALTHOUGH IT FELT ONLY
 3 ABOVE THE \$3 MILLION THRESHOLD.

4 THE COURT: AND THESE WERE SETTLEMENT DISCUSSIONS
 5 OVER IN CIRCUIT COURT, IN THE STATE OF HAWAII, WITH THE JUDGE
 6 PRESIDING?

7 MR. DONSBACH: THAT IS CORRECT.
 8 THE COURT: OKAY.

9 SO, WHAT HAPPENED HAPPENED OVER IN STATE COURT?

10 MR. DONSBACH: THE THIRD PARTY LAWSUIT, YES,
 11 YOUR HONOR, WAS IN STATE COURT. AND I DON'T BELIEVE THAT
 12 OPERATES AS ANY LIMITATION ON FEDERAL JURISDICTION HERE.
 13 THERE'S NO DISPUTE THAT IT'S A DIVERSITY CASE. THE TWO
 14 PARTIES HAVE CITIZENSHIP IN DIFFERENT STATES, AND WE FELT THIS
 15 WAS THE APPROPRIATE FORUM TO BE IN. THE CASE, WHEN IT WAS IN
 16 STATE COURT, ACTUALLY WAS BEFORE JUDGE CHANG, WHOM I
 17 UNDERSTAND IS NO LONGER A STATE COURT JUDGE, SO THERE WOULDN'T
 18 BE ANY VALUE --

19 THE COURT: SO I SHOULD JUST SEND IT DOWN TO HIM...
 20 YOU FOLKS WANT TO -- OKAY, YOU WANT TO AGREE TO HAVE JUDGE
 21 CHANG TRY THIS CASE? HE'S HERE. HE'S A MAGISTRATE. YOU CAN
 22 AGREE TO HAVE HIM TRY THIS CASE.

23 MR. DONSBACH: THAT WOULD BE SOMETHING THAT I WOULD
 24 BE HAPPY TO TAKE BACK TO MY CLIENT AND HAVE THEM CONSIDER.
 25 BUT THE REASON I MENTION THAT IS, THERE'S NO VALUE TO THE
 0024

1 PARTIES IN GOING BACK TO STATE COURT, BECAUSE THE JUDGE WHO
 2 WAS INVOLVED IN THE SETTLEMENT DISCUSSIONS, WHO HAD SOME
 3 KNOWLEDGE OF THE LITIGATION, IS NO LONGER --

4 THE COURT: IS AVAILABLE TO YOU HERE.

5 MR. DONSBACH: WELL, HE IS NO LONGER IN THE STATE
 6 COURT, AND I --

7 THE COURT: WELL, HE IS HERE IN THE BUILDING, AND I
 8 AM HAPPY TO MAKE HIM AVAILABLE TO YOU, AND I AM SURE HE WOULD
 9 BE HAPPY TO HELP.

10 IT WOULDN'T SOLVE THE PROBLEM, THOUGH, OF THE FACT
 11 THAT THIS IS HAWAII LAW. AND HE ISN'T A STATE JUDGE ANY
 12 LONGER. AND, WHILE I ADMIRE AND APPRECIATE HIS EXPERTISE, HE
 13 WOULDN'T BE ACTING AS A STATE JUDGE WHEN HE PRONOUNCED ANY
 14 DECISION, IN TERMS OF HAWAII LAW, THOUGH HE PROBABLY WOULD BE
 15 A LOT BETTER AT IT THAN I AM, HAVING HAD HIS EXPERIENCE. BUT
 16 I REALLY DO FEEL THERE IS A QUESTION HERE ABOUT WHETHER OR NOT
 17 THIS SHOULD BE IN THIS COURT. THAT IS ONE WAY OF RESOLVING
 18 IT...

19 WHAT'S THE POSITION OF THE DEFENDANTS ON HAVING
 20 JUDGE CHANG -- HAVING IT DESIGNATED TO JUDGE CHANG?

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21 MR. MIYOSHI: WELL, CERTAINLY, I THINK WE WOULD HAVE
 22 TO TALK TO OUR CLIENT ABOUT THAT; BUT, WE WOULD CERTAINLY
 23 OFFER AND CONSIDER THAT.

24 THE COURT: JUDGE CHANG WILL BE SO PLEASED...
 25 ANYTHING ELSE YOU WANTED TO SAY, MR. DONSBACH?

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1 MR. DONSBACH: IF THE COURT WERE LOOKING FOR THE
 2 DISCUSSION OF THE DISCRETIONARY JURISDICTION UNDER THE
 3 DECLARATORY JUDGMENT ACT, I WOULD CERTAINLY BE HAPPY TO
 4 ADDRESS THAT BRIEFLY.

5 THE COURT: SURE, GO AHEAD.

6 MR. DONSBACH: THE TWO SIGNIFICANT --

7 THE COURT: BECAUSE THAT REALLY IS OF CONCERN TO ME.
 8 BUT I DIDN'T KNOW IT WAS JUDGE CHANG WHO HAD PRESIDED, SO
 9 THAT'S JUST A NEW WRINKLE. BUT GO AHEAD.

10 MR. DONSBACH: AND I DO THINK THE COURT IS WELL
 11 TAKEN IN WANTING TO ADDRESS THAT ISSUE AND HAVE SOME WRITTEN
 12 FINDINGS, SINCE THE NINTH CIRCUIT HAS INDICATED THAT THAT IS
 13 THE PREFERABLE PRACTICE. SO I THINK THAT THAT DOES MAKE SENSE
 14 TO DO THAT FAIRLY EARLY.

15 THE TWO REALLY SIGNIFICANT FACTORS HERE THAT ARE
 16 RELEVANT UNDER THE NINTH CIRCUIT PRECEDENT IS THAT, NUMBER
 17 ONE, THERE IS NO PENDING STATE COURT ACTION INVOLVING THESE
 18 ISSUES BETWEEN THESE PARTIES. THE EARLIER THIRD-PARTY
 19 LITIGATION DID NOT INVOLVE ANY ISSUES OF COVERAGE, WAS SIMPLY
 20 THE LAWSUIT THAT WAS FILED AGAINST STRAUB THAT GAVE RISE TO
 21 THE INSURANCE CLAIM. SO THAT'S NOT AT ALL A FACTOR UNDER THE
 22 NINTH CIRCUIT'S TEST. IN FACT, THAT TEST WAS DEVELOPED TO
 23 GIVE THE FEDERAL COURTS DISCRETION TO DISMISS DECLARATORY
 24 JUDGMENT CLAIMS WHERE THERE WAS A CLAIM PENDING UNDER STATE
 25 LAW INVOLVING THE SAME ISSUES, THE SAME PARTIES -- BASICALLY

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1 THE SAME LITIGATION. THAT'S NOT AT ALL THE CASE HERE.
 2 THERE'S NO CLAIM PENDING OR IMPENDING IN STATE COURT.

3 THE OTHER SIGNIFICANT FACTOR HERE, WHICH I THINK IS
 4 DISPOSITIVE, IS THAT THERE ARE, IN ADDITION TO THE DECLARATORY
 5 RELIEF CLAIM, THERE ARE THREE MONETARY RELIEF CLAIMS ALLEGED
 6 IN THE COMPLAINT FOR SUBROGATION, EQUITABLE SUBROGATION,
 7 CONTRIBUTION AND INDEMNITY. AND THE CASES -- BOTH DIZOL AND
 8 TWO RECENT CASES -- HAVE SAID THAT WHERE THAT IS THE CASE,
 9 THERE REALLY IS NO REASON TO CONSIDER DISMISSING THE CASE
 10 UNDER THE DECLARATORY JUDGMENT ACT, AND, IN FACT, IT WOULD
 11 PROBABLY BE AN ABUSE OF DISCRETION TO DO THAT, BECAUSE NONE OF
 12 THE FACTORS WOULD SUPPORT THAT DISMISSAL.

13 WHEN YOU LOOK AT THE FACTORS, THE UNDERLYING
 14 CONSIDERATION IS NOT TO HAVE DUPLICATIVE LITIGATION. HERE
 15 THAT WOULD ACTUALLY -- IT WOULD ACTUALLY POTENTIALLY OPERATE
 16 THAT WAY, BECAUSE THE COURT DOESN'T HAVE DISCRETIONARY
 17 JURISDICTION, BUT, INSTEAD, HAS MANDATORY JURISDICTION OVER
 18 THE CLAIMS FOR MONETARY RELIEF. SO, IF THE COURT WERE TO
 19 DISMISS THE DECLARATORY RELIEF CLAIM ON THE BASIS THAT IT
 20 SHOULD BE LITIGATED IN STATE COURT, THE RESULT WOULD BE THE
 21 RISK OF HAVING DUPLICATIVE LITIGATION AT THAT POINT.

22 THE COURT: WELL, WE ALSO NEED TO LOOK AT THE
 23 QUESTION OF MY PRONOUNCING STATE LAW, WHEN IT IS AVAILABLE TO
 24 SEND, FOR EXAMPLE, SEND A QUESTION TO THE STATE SUPREME COURT
 25 FOR A DECLARATION AS TO WHAT THEY WOULD DO IN A SITUATION LIKE

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1 THIS.

2 MR. DONSBACH: THE LAW, I THINK, IS SUFFICIENTLY
 3 WELL DEVELOPED WITH ALAMEDA, AND THE WEALTH OF AUTHORITY FROM
 4 OTHER STATES, SHOWING THAT THE MODERN DOCTRINE ALLOWS
 5 CONTRIBUTION UNDER THE CIRCUMSTANCE. SO, ALTHOUGH PERHAPS

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6 THERE IS NO HAWAII CASE DIRECTLY ON POINT SPECIFICALLY
7 ADDRESSING THAT NARROW ISSUE, I THINK THE AUTHORITY THAT DOES
8 EXIST IS PROVIDING SUFFICIENT GUIDANCE TO ALLOW THIS COURT TO
9 MAKE A DECISION. AND I DON'T THINK IT REPRESENTS A
10 PARTICULARLY NOVEL ISSUE FOR -- ONE THAT CAN'T BE DECIDED BY
11 REFERENCE TO THE EXISTING PRECEDENT. SO I DON'T THINK THAT
12 CIRCUMSTANCE WOULD REALLY BE A BASIS FOR DISMISSING THIS CASE
13 IN FAVOR OF HAVING IT LITIGATED IN STATE COURT.

14 I THINK YOU ALSO HAVE TO LOOK AT THE FACT THAT THIS
15 CASE WAS FILED, I THINK, IN MARCH, AND -- WHILE WE ARE JUST
16 NOW GETTING TO THE MOTION TO DISMISS, THERE HAVE BEEN SOME
17 DISCOVERY PROPOUNDED AND SOME RESPONSES SERVED. SO WE ARE
18 GETTING TO THE MID-POINT OF THE LITIGATION, AND I THINK IT
19 WOULD BE DISRUPTIVE TO HAVE IT DISMISSED AND IT HAVE TO BE
20 REFILED IN STATE COURT.

21 THE COURT: IS THERE A STATUTE OF LIMITATIONS
22 PROBLEM OF ANY KIND?

23 MR. DONSBACH: NOT THAT I AM AWARE OF. BUT I DON'T
24 KNOW WHAT TDC'S POSITION IS ON THAT.

25 THE COURT: OKAY, THANK YOU.

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1 MR. DONSBACH: THANK YOU.

2 THE COURT: MR. MIYOSHI, WHAT IS YOUR POSITION ON
3 THE STATUTE OF LIMITATIONS QUESTION?

4 MR. MIYOSHI: I THINK WE HAVE BEEN LOOKING AT THAT
5 ISSUE QUITE INTENTLY. WE HAVEN'T REALLY COME TO ANY KIND OF A
6 CONCRETE DETERMINATION ON WHAT THE --

7 THE COURT: DO YOU BELIEVE THAT THERE IS A STATUTE
8 OF LIMITATIONS PROBLEM FOR THEM REFILED IN STATE COURT?

9 MR. MIYOSHI: I WOULD BE RELUCTANT TO GIVE A
10 CONCRETE ANSWER ONE WAY OR THE OTHER, JUST BECAUSE I DON'T
11 THINK WE'VE DONE ENOUGH TO LOOK AT THAT ISSUE TO SAY ONE WAY
12 OR THE OTHER WHETHER, IF THEY REFILED AT THIS POINT, WHETHER
13 THERE WOULD BE A STATUTE OF LIMITATIONS PROBLEM.

14 IF I MAY, I WOULD JUST LIKE TO MAKE A -- ADDRESS A
15 COUPLE POINTS: FIRST, I WOULD LIKE TO JUST -- WITH RESPECT TO
16 THE FACTS IN THE UNDERLYING CASE, AND I DON'T WANT TO GET TOO
17 MUCH INTO THEM, BUT I JUST WOULD LIKE TO SAY THAT, WHEN THEY
18 INITIALLY FILED THE COMPLAINT, THE COMPLAINT WAS FILED AGAINST
19 STRAUB DIRECTLY, AND IT DID NOT NAME ANY OF THE ADDITIONAL
20 NAMED INSUREDS, AND THAT'S ONE OF THE REASONS WHY --

21 THE COURT: WHEN YOU SAY THEY FILED THE COMPLAINT --
22 MR. MIYOSHI: WHEN THE PLAINTIFFS IN THE UNDERLYING
23 TORT ACTION --

24 THE COURT: OKAY.

25 MR. MIYOSHI: -- FILED THE COMPLAINT AGAINST STRAUB,
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1 IT WAS FILED SOLELY AGAINST STRAUB, INITIALLY, AND IT WAS
2 TDC'S POSITION THAT, BECAUSE THEY WERE THE ONLY ONES NAMED AS
3 DEFENDANTS, THAT IT ONLY TRIGGERED ONE INSURANCE LIMITS --

4 THE COURT: I THOUGHT THERE WAS AN AMENDMENT THAT

5 NAMED TWO DOCTORS --

6 MR. MIYOSHI: THERE WAS AN AMENDMENT, AND THAT'S
7 WHAT HAPPENED, IS, RELIANCE BECAME, I THINK, SIGNIFICANTLY
8 INVOLVED IN THE SETTLEMENT MATTERS, AND THAT BECAME THE ISSUE
9 OF WHETHER OR NOT THE ADDITIONAL NAMED INSUREDS WERE ACTUALLY
10 PART OF THE SUIT. AND I BELIEVE IT WAS NOVEMBER 2ND, WHICH
11 WAS SEVEN DAYS BEFORE THE SETTLEMENT, THEY ACTUALLY AMENDED
12 THE COMPLAINT TO ADD THESE -- THE TWO DOCTORS IN, AND THEN IT
13 SETTLED ON THE 9TH. THE POINT BEING IS THAT, RELIANCE HAD
14 THEIR HAND IN THIS THING THE WHOLE WAY. AND, IN FACT, I
15 BELIEVE -- IT'S MY UNDERSTANDING THAT THEY ARE THE ONES WHO
16 WERE PRESSING FOR THE PLAINTIFFS TO ESSENTIALLY AMEND THE

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17 COMPLAINT SO THAT IT WOULD IMPLICATE THE ADDITIONAL POLICY
 18 LIMITS, UNDER OUR OWN THEORY. SO I THINK THAT THAT NEEDS
 19 TO -- YOU KNOW, THAT THERE IS SOME ADDITIONAL CONTEXT, IN
 20 TERMS OF THE FACTS, OF HOW SETTLEMENT CAME ABOUT.
 21 RELIANCE WAS SIGNIFICANTLY INVOLVED IN THE

22 SETTLEMENT OF THIS MATTER.

23 ADDITIONALLY, WITH RESPECT TO THE CHOICE OF LAW
 24 ISSUE, IT'S OUR POSITION THAT ALL THE EVENTS OCCURRED IN
 25 HAWAII. THE CONTRACT WAS EXECUTED IN HAWAII. THE UNDERLYING
 0030

1 MATTER OCCURRED HERE IN HAWAII. THE INSUREDS ARE HERE IN
 2 HAWAII. THUS, I THINK THAT THE CORRECT CHOICE OF LAW WOULD BE
 3 HAWAII.

4 AND IF THIS COURT WOULD ENTERTAIN -- OR WOULD LIKE
 5 TO HAVE ADDITIONAL BRIEFING ON THAT PARTICULAR ISSUE, WE
 6 CERTAINLY WOULD BE AMENABLE TO DOING SO.

7 FINALLY, THE PLAINTIFFS ATTEMPT TO MAKE A
 8 DISTINCTION BETWEEN THE EXCESS PRIMARY INSURER CASES THAT WE
 9 HAVE CITED IN OUR REPLY MEMO BY ESSENTIALLY SAYING THAT, WELL,
 10 THESE CASES INVOLVE PRIMARY INSURERS SEEKING RECOVERY AGAINST
 11 THE EXCESS INSURER. I THINK THAT MISSES THE POINT OF THOSE
 12 CASES. AND IF YOU LOOK AT THE GENERAL PROPOSITIONS THAT WERE
 13 SET OUT IN ALL OF THOSE CASES, IT'S ESSENTIALLY THAT PRIMARY
 14 AND EXCESS INSURERS HAVE COMPLETELY AND SEPARATE AND DIFFERENT
 15 OBLIGATIONS OF COVERAGE; AND, THEREFORE, THERE'S NO COMMON
 16 OBLIGATION, BURDEN OR LIABILITY AS BETWEEN PRIMARY AND EXCESS
 17 INSURERS. AND THAT, I THINK, IS THE POINT HERE:

18 AND I THINK YOUR HONOR IS CORRECT IN SAYING THAT
 19 THIS WOULD BE A CASE OF FIRST IMPRESSION HERE IN HAWAII, FOR A
 20 HAWAII STATE DECISION, BECAUSE, EVEN THOUGH ALAMEDA TALKS
 21 ABOUT THE DOCTRINE OF VOLUNTEER AND HOW THAT WOULD AFFECT
 22 ONE'S STATUS IN THE SUBROGATION CLAIM, THERE REALLY IS NO CASE
 23 LAW WITH RESPECT TO HOW TWO DIFFERENT INSURERS WHO HAVE
 24 SEPARATE AND COMPLETELY INDEPENDENT OBLIGATIONS, HOW THE COURT
 0031 WOULD VIEW THEIR OBLIGATIONS IN CIRCUMSTANCES SIMILAR TO THE

1 ONE WE HAVE HERE. SO, IN THAT SENSE, I DO BELIEVE THAT THIS
 2 WOULD BE A CASE OF FIRST IMPRESSION FOR THIS COURT.

3 AND, IN THAT SENSE, MAYBE IT IS SOMETHING THAT THE
 4 COURT MAY EXERCISE DISCRETION IN SAYING, LISTEN, THIS SHOULD
 5 BE HANDLED BY THE STATE COURT.

6 THANK YOU, YOUR HONOR.
 7 THE COURT: THANK YOU.

8 DID YOU WANT TO SAY ANYTHING ELSE, MR. DONSBACH?
 9 MR. DONSBACH: YES, YOUR HONOR, IF I COULD JUST

10 ADDRESS A COUPLE OF QUICK POINTS.

11 FIRST, WITH RESPECT TO THE CHOICE OF LAW ISSUE, IF
 12 THE COURT WOULD LIKE ADDITIONAL BRIEFING ON THAT, I THINK
 13 MR. MIYOSHI --

14 THE COURT: WELL, YOU CONCEDED, AT LEAST FOR
 15 PURPOSES OF THIS DECISION, HAWAII LAW. THEY SAY HAWAII LAW
 16 APPLIES, SO IT DOESN'T SEEM LIKE THERE'S ANY REASON TO -- IT
 17 APPEARS THAT HAWAII LAW APPLIES, SO I DON'T SEE ANY REASON TO
 18 DO ANYTHING FURTHER ON THAT.

19 MR. DONSBACH: THAT'S FINE. I WAS JUST GOING TO
 20 SUGGEST THAT IF THE COURT FELT IT APPROPRIATE, WE WOULD BE
 21 HAPPY TO DO THAT, BUT --

22 THE COURT: WELL, I DON'T SEE ANYTHING THAT GETS US
 23 ANYPLACE ELSE, AND NOBODY SAID ANYTHING TODAY THAT GETS US
 24 ANYPLACE ELSE, SO, IT SEEMS TO ME, SINCE YOU HAVE AGREED TO
 25 HAVE IT APPLY, AND THEY SAY IT DOES APPLY, THERE'S NO REASON
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1 TO DO ANYTHING ELSE ON IT AT THIS POINT, IN TERMS OF THIS

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2 MOTION.

3 MR. DONSBACH: THAT'S FINE, YOUR HONOR.

4 JUST A COUPLE OTHER POINTS: FIRST, I WOULD DISAGREE
 5 THAT, TO THE EXTENT THERE IS AN ISSUE OF FIRST IMPRESSION,
 6 THAT THAT WOULD BE A BASIS FOR DISMISSAL OF THE CASE. IT IS A
 7 DIVERSITY CASE, AND IT'S NOT UNUSUAL TO HAVE ISSUES ARISE IN
 8 DIVERSITY CASES THAT MAY NOT HAVE EXPRESSLY BEEN DECIDED ON
 9 ALL FOOURS IN THE STATE COURT. AND I THINK THAT THAT WOULD NOT
 10 BE A BASIS FOR DISMISSING THE CASE, TO THE EXTENT THE COURT
 11 DID FEEL THERE WAS AN ISSUE OF FIRST IMPRESSION.

12 AND, WITH RESPECT TO THE IDEA OF HAVING JUDGE CHANG
 13 ASSUME THE HANDLING OF THE CASE, I THINK THAT WOULD BE
 14 SOMETHING THAT I WOULD BE INCLINED TO RECOMMEND TO THE CLIENT.
 15 BUT, AGAIN, I THINK, AS BOTH PARTIES HAVE INDICATED, THAT
 16 WOULD BE SOMETHING THAT WOULD BE A CLIENT DECISION.

17 AND, ON THE ISSUE OF COMMON LIABILITY, IF I COULD
 18 JUST ADDRESS THAT A LITTLE BIT FURTHER, BECAUSE I MAY NOT HAVE
 19 SUFFICIENTLY DISCUSSED THAT EARLIER, I THINK THE KEY FACT HERE
 20 IS THAT WE HAVE A PRIMARY POLICY THAT, AS ALLEGED IN THE
 21 COMPLAINT, WAS EXHAUSTED; THEREFORE, AN EXCESS POLICY THAT WAS
 22 TRIGGERED. AND THIS IS DIFFERENT THAN THE CASES THAT TDC
 23 RELIES ON, WHERE YOU HAD A PRIMARY POLICY THAT WAS NOT
 24 EXHAUSTED, AND THE COURT SAID THERE'S NO COMMON LIABILITY, THE
 25 EXCESS POLICY IS NOT EVEN IMPLICATED, THEREFORE, THE PRIMARY

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1 INSURER IS NOT ENTITLED TO CONTRIBUTION AGAINST THE EXCESS
 2 INSURER.

3 HERE, WE DO HAVE A SPECIES OF COMMON LIABILITY, AT
 4 LEAST SUFFICIENT COMMON LIABILITY TO HAVE A CONTRIBUTION
 5 CLAIM, BECAUSE THE PRIMARY POLICY WAS EXHAUSTED, AND YOU HAD A
 6 SITUATION WHERE THE CASE COULD BE SETTLED FOR \$4.3 MILLION,
 7 AND THERE WAS A DISPUTE BETWEEN THE TWO INSURERS AS TO HOW
 8 MUCH PRIMARY COVERAGE WAS AVAILABLE. AND YOU DID HAVE, IN
 9 FACT, A SCENARIO WHERE BOTH INSURERS WERE GOING TO BE
 10 RESPONSIBLE FOR SETTLING THIS CASE, AND IF THEY DIDN'T DO
 11 THAT, WOULD BE AT RISK OF A BAD FAITH JUDGMENT LATER BEING
 12 ENTERED FOR THE FULL AMOUNT OF WHATEVER JUDGMENT THE THIRD-
 13 PARTY PLAINTIFFS COULD GET IN A TRIAL.

14 SO, UNLIKE THE CASES THAT TDC RELIES UPON, YOU DID
 15 HAVE TWO INSURERS THAT HAD SOME COMMON OBLIGATIONS TO THE
 16 INSURED TO GO AHEAD AND SETTLE THE CASE.

17 THE COURT: THAT'S AN INTERESTING IDEA, THE IDEA
 18 THAT THERE WAS A SANDWICH, AND WE'RE JUST FIGHTING ABOUT THE
 19 HAM IN THE MIDDLE.

20 ANYTHING ELSE?

21 MR. DONSBACH: NO, YOUR HONOR.

22 THE COURT: OKAY.

23 MR. DONSBACH: THANK YOU.

24 THE COURT: THANK YOU.

25 I AM GOING TO APPLY HAWAII LAW FOR THE REASONS I

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1 HAVE STATED, AND I AM GOING TO DENY THE MOTION TO DISMISS,
 2 BECAUSE I BELIEVE THERE ARE SOME CLAIMS STATED, AND IT IS NOT
 3 SUFFICIENTLY CLEAR ON THE BASIS OF THIS COMPLAINT THAT THERE
 4 IS NO THEORY THAT WOULD NOT APPLY.

5 NOW, THE REMAINING QUESTION, THEN, IS WHETHER OR NOT
 6 THE COURT SHOULD EXERCISE JURISDICTION. AND I HAVE HAD YOU
 7 BRIEF THAT. AND, IN DECIDING THE MOTION TO DISMISS, I AM JUST
 8 LOOKING WITHIN THE FOUR CORNERS OF THE DOCUMENT. WHILE WE
 9 HAVE HAD A LOT OF INFORMATION PUT BEFORE THE COURT TODAY ABOUT
 10 WHAT HAPPENED IN THE SETTLEMENT, AND WHERE THE CONTRACTS WERE
 11 SIGNED, AND THAT TYPE OF THING, I'M NOT CONSIDERING THAT WITH
 12 RESPECT TO THE MOTION TO DISMISS; THAT WOULD BE IMPROPER, AND

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13 I'M NOT DOING THAT.

14 BUT I DID ASK THOSE QUESTIONS, AND I AM INTERESTED
 15 FOR WHAT ACTUALLY WENT ON WHEN I AM TRYING TO DECIDE WHETHER
 16 OR NOT THIS IS SOMETHING THAT THE COURT SHOULD RETAIN
 17 JURISDICTION OVER. AND I THINK IT'S A CLOSE QUESTION IN THIS
 18 CASE, BECAUSE, EVEN THOUGH THERE'S NOTHING PENDING, IT WAS A
 19 MATTER DECIDED WITH THE ASSISTANCE OF A STATE JUDGE; AND,
 20 THERE IS THE ISSUE OF THE STATE QUESTION. NOW, THE MONETARY
 21 RELIEF THAT'S BEEN REQUESTED, THAT MUDDIES THE WATERS
 22 SOMEWHAT. YOU COULD TAKE THE POSITION THAT YOU CAN'T REACH
 23 THE OTHER TWO -- THE OTHER THREE THEORIES WITHOUT DOING A
 24 DECLARATORY JUDGMENT AS TO LIABILITY, ETC. BUT IT SEEMS TO ME
 25 THERE ARE SEVERAL ARROWS IN OUR QUIVER THAT WE CAN LOOK AT:
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1 ONE, THIS IDEA THAT JUDGE CHANG ACTUALLY KNOWS
 2 SOMETHING ABOUT THIS CASE. AND IT WOULD MAKE A LOT OF
 3 SENSE -- AND WE DO ALLOW, IN THIS JURISDICTION, FOR PARTIES TO
 4 AGREE TO A PARTICULAR MAGISTRATE JUDGE. WE HAVE THREE
 5 TALENTED MAGISTRATE JUDGES, AND SO WE DON'T WORRY TOO MUCH
 6 ABOUT CHOOSING ONE OR THE OTHER. AND THEY WORK IT OUT. BUT,
 7 WE COULD, IN THIS CASE, HAVE THIS MATTER DESIGNATED, AND JUST
 8 HAVE JUDGE CHANG DECIDE IT. AND IT MIGHT REALLY SAVE A LOT OF
 9 ATTORNEY'S FEES, OVERALL, BECAUSE HE IS ALREADY CONVERSANT
 10 WITH IT AND WOULD BE ABLE TO ASSIST YOU. THAT'S THE FIRST
 11 QUESTION.

12 THE SECOND QUESTION IS, WE COULD SEND -- IF THE
 13 MONETARY RELIEF ISSUES REALLY ARE GOING TO PREVENT SENDING IT
 14 OVER TO STATE COURT, DISMISSING IT AND HAVING IT REFILED IN
 15 STATE COURT, THEN WE CAN DO A CERTIFIED QUESTION TO THE
 16 SUPREME COURT AS TO WHAT THEY WOULD WANT TO DO IN THIS
 17 SITUATION. BUT THAT COULD DRAG IT OUT A BIT.

18 SO, WHAT I AM GOING TO ASK YOU TO DO IS TO GO BACK
 19 TO YOUR CLIENTS AND SEE WHETHER OR NOT YOU WILL AGREE TO
 20 DESIGNATE IT TO MAGISTRATE CHANG. I DON'T WANT TO PRESSURE
 21 YOU -- I'M NOT SAYING ANYBODY HAS TO DO THIS -- BUT I AM NOT
 22 GOING TO DECIDE WHETHER OR NOT WE SHOULD KEEP THE
 23 JURISDICTION, OR WHETHER OR NOT WE NEED TO CERTIFY A QUESTION
 24 TO THE HAWAII SUPREME COURT -- WHICH WOULD COME LATER IF WE DO
 25 DO THAT -- UNTIL YOU FOLKS CONSIDER THAT OPTION. BECAUSE I
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1 DIDN'T KNOW IT WAS JUDGE CHANG, AND MAYBE YOU HADN'T EVEN
 2 THOUGHT ABOUT THAT BEFORE AS AN OPTION. AND I THINK IT'S A
 3 VERY INTERESTING OPTION. SO I'M GOING TO GIVE YOU A WEEK TO
 4 CONTACT YOUR CLIENTS AND LET ME KNOW ABOUT THAT.

5 IS THERE SOMETHING YOU WANTED TO SAY, MS. LENDIO?

6 MS. LENDIO: YES, YOUR HONOR. WE'LL BRING THAT BACK
 7 TO OUR CLIENTS AND SERIOUSLY CONSIDER THAT, ALONG WITH THE
 8 COMMENTS OF THE COURT. JUST OFF THE TOP OF MY HEAD, I DO SEE
 9 THAT AS BEING A LITTLE BIT PROBLEMATIC, BECAUSE I BELIEVE THAT
 10 WE HAD INTENDED TO LIST JUDGE CHANG AS A WITNESS. SO THAT
 11 WOULD BE -- BUT THAT'S SOMETHING THAT WE --

12 THE COURT: HEY, YOU DON'T EVEN HAVE TO DO A
 13 SUBPOENA...

14 MS. LENDIO: (LAUGHING.)

15 THE COURT: I MEAN, REALISTICALLY, THAT'S A VERY
 16 GOOD REASON WHY JUDGE CHANG OUGHT TO DO IT.

17 MS. LENDIO: I UNDERSTAND, YOUR HONOR, AND WE WILL
 18 SERIOUSLY CONSIDER THAT AND BRING THAT BACK TO OUR CLIENT.

19 THE COURT: AND I THINK HIS REPUTATION IS SUCH THAT
 20 EVERYBODY MAY BE COMFORTABLE WITH THAT.

21 SO, I AM GOING TO GIVE YOU UNTIL NEXT FRIDAY TO
 22 NOTIFY THE COURT WHETHER OR NOT YOU WOULD BE WILLING TO HAVE
 23 IT DESIGNATED TO JUDGE CHANG. IF NOT, IF YOU CAN'T AGREE TO

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24 DO THAT, THEN I WILL DECIDE WHETHER OR NOT TO RETAIN
25 JURISDICTION.

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1 MR. DONSBACH: YOUR HONOR, COULD I ASK THAT THAT BE
2 EXTENDED TO THE FOLLOWING MONDAY? I MAY HAVE ONE OF THE
3 DECISION MAKERS OUT ON VACATION --

4 THE COURT: SURE. I MEAN, IT ISN'T -- WELL, WE
5 CAN'T -- WE'RE GOING TO LOSE THIS LAW CLERK AT THE END OF THE
6 MONTH, SO WE CAN'T EXTEND IT TOO MUCH...

7 MR. DONSBACH: AND, IF I GET AN ANSWER SOONER,
8 WHENEVER I GET THE ANSWER, I'LL CONTACT THE COURT AND OPPOSING
9 COUNSEL --

10 THE COURT: OKAY --

11 MR. DONSBACH: -- BUT I JUST DON'T WANT TO --

12 THE COURT: SURE. IS THE 19TH SUFFICIENT TIME? OR
13 THE 20TH? OR WHATEVER? THE 19TH IS A MONDAY. IS THAT --

14 MR. DONSBACH: THAT WOULD BE FINE, YOUR HONOR.

15 THE COURT: -- SUFFICIENT TIME?

16 MR. MIYOSHI: YES, YOUR HONOR.

17 THE COURT: OKAY. AND IF YOU WOULD JUST FILE
18 SOMETHING INDICATING ONE WAY OR ANOTHER, IN WRITING, SO WE
19 HAVE THE RECORD, AND THEN I WILL DECIDE WHETHER OR NOT TO
20 RETAIN IT. AND, AS I SAY, I CAN DEAL WITH THE ISSUE OF THE --
21 BY CERTIFICATION TO THE HAWAII SUPREME COURT; THAT'S A
22 POSSIBILITY.

23 OKAY, IF NOTHING FURTHER, THANK YOU.

24 MR. DONSBACH: THANK YOU, YOUR HONOR.

25 MR. MIYOSHI: THANK YOU, YOUR HONOR.

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1 THE BAILIFF: ALL RISE, PLEASE.

2 THE COURT STANDS IN RECESS.

3 (THE HEARING IN THE ABOVE-ENTITLED.

4 CAUSE WAS CONCLUDED AT 10:45 A.M.)

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I, STEPHEN B. PLATT, OFFICIAL COURT REPORTER,
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9 UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII, DO HEREBY
10 CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF
11 PROCEEDINGS BEFORE THE HONORABLE HELEN GILLMOR, UNITED STATES
12 DISTRICT JUDGE.

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20 TUESDAY, JUNE 15, 2004 ----- STEPHEN B. PLATT, CSR NO. 248

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